

***United States Court of Appeals
for the Second Circuit***



APPENDIX

74 - 2257

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

HENRY JENKINS,

Appellant.

Docket No. 74-2257

APPENDIX

ON APPEAL FROM A JUDGMENT OF
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

SHEILA GINSBERG,

Of Counsel

PAGINATION AS IN ORIGINAL COPY

DATE	PROCEEDINGS	CLERK'S FEES	
		PLAINTIFF	DEFENDANT
/16/74	Filed Govt's affdvt. for writ of habeas corpus ad testificandum for V. Cartiglia. Writ satisfied 6/3/74 Knapp, J.		
/13/74	Before Gagliardi, J. - jury trial begun. Govt's motion to dismiss counts 13 & 16- Granted Pollack, J.		
/14/74	Trial cont'd & concluded - on deft's motion court grants a mistrial. new trial is set for 6/17/74 at 10:30AM. Deft. cont'd on present bail. Gagliardi J.		
/17/74	Before Gagliardi, J. Jury trial begun.		
/18/74	Trial cont'd. Juror #3, Brian Azar is excused. alternate juror #1 is no juror #3.		
/19/74	Trial cont'd and concluded. deft found not guilty on cts. 1, 2, 3, 7, 8, 9, 12, 15 and guilty on cts. 4, 5, 6, 10, 11, 14. Pre-sentence investigation ordered. for sentence on 9/11/74 at 9:30AM. Deft. cont'd on present bail until date of sentence. Gagliardi, J.		
3/74	Filed transcript of record on proceedings, dated June 17, 18, 19, 1974.		
11/74	Filed JUDGMENT (atty. present) - Deft. is committed to the custody of the Atty. Gen'l. for imprisonment for a period of SIX (6) MONTHS on each of counts 4, 5, 6, 10, 11, 14 CONCURRENTLY and placed on THREE (3) YEARS probation to follow service of sentence. Deft. is continued on present bail pending appeal. Gagliardi, J. mn issued copies. ent. 9/20/74		
11/74	Filed notice of appeal from judgment of 9/11/74. mailed copies. Deft. permitted to file appeal in forma pauperis. Gagliardi, J.		

JUDGE POLLACK

74 CRIM. 261

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	For U. S.:
vs.	V. Thomas Fryman, Jr. AUSA
HENRY JENKINS	264-6174
	For Defendant:

(01) ABSTRACT OF COSTS	AMOUNT	CASH RECEIVED AND DISBURSED					
		DATE	NAME	RECEIVED		DISBURSED	
Fine,							
Clerk,							
Marshal, ✓							
Attorney,							
Commissioner's Court, 18							
W. Tenney, 1708							
Possess. of stolen mail.							
(Sixteen Counts)							

DATE	PROCEEDINGS
1-18-74	Filed indictment.
1-1-74	Deft Henry Jenkins appears (atty Roland Thau, Legal Aid present) Deft pleads not guilty, 10 days for motions, Case assigned to Pollack, J. Bail Fixed by Court at \$5,000.00 PR\$ unsecured. Tenney, J.
5/30/74	Filed Govt's notice of readiness for trial.
6/12/74	Filed Govt's affdvt for writ of habeas corpus ad testificandum for V. Cartiglia. ret. 6/13/74.
6/17/74	Filed Govt's afdvt. for writ of habeas corpus ad testificandum for V. Cartiglia ret: 6/17/74.

Jury returns with a verdict.

Counts 1 - not guilty
2 - not guilty
3 - not guilty
4 - guilty
5 - guilty
6 - guilty
7 - not guilty
8 - not guilty
9 - not guilty
10 - guilty
11 - guilty
12 - not guilty
14 - guilty
15 - not guilty

P.D.I. Order - for sentence on 9-11-74 at
9:30 AM. Deft continued on present bail
until date of sentence.

Rb Gagliardi, J

Sept. 11, 1974 - Deft. sentenced to 6 months imprisonment on each of ~~counts~~
counts 4-5-6-10-11-14 concurrently and placed on
probation for 3 years to ~~be~~ follow service of
sentence. Deft. continued on present bail pending
appeal.

GAGLIARDI, J

(2)

VTF, Jr.:slc
73-3846
d-378

COUNT

ADDRESSEE

8

Elsie Rodriques
1020 Trinity Avenue
Bronx, New York 10456

9

Asteria Calero
965 College Avenue
Bronx, New York 10456

10

Luz Montijo
360 East 166th Street
Bronx, New York 10456

11

Mary Praylow
312 East 164th Street
Bronx, New York 10456

12

Clara Chaplin
973 Teller Avenue
Bronx, New York 10456

13

Mary Harold
1063 Teller Avenue
Bronx, New York 10456

14

Julia Mendez
1072 Teller Avenue
Bronx, New York 10456

15

Rosita Williamson
669 East 165th Street
Bronx, New York 10456

16

Mary Smith
320 East 165th Street
Bronx, New York 10456

(Title 18, United States Code, Section 1708.)

Paul J. Curran
Foreman

Paul J. Curran
PAUL J. CURRAN
United States Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

74 CRIM. 261

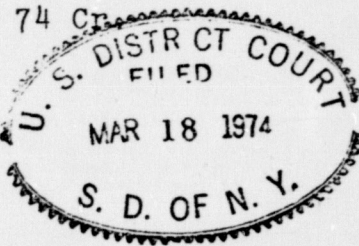
UNITED STATES OF AMERICA :

- v - :

HENRY JENKINS, :

Defendant. :

INDICTMENT



The Grand Jury charges:

On or about the 16th day of April, 1973 in the Southern District of New York, HENRY JENKINS, the defendant, did unlawfully, wilfully and knowingly have in his possession the contents of certain letters, addressed as hereinafter set forth, which had been stolen, taken, embezzled and abstracted from and out of the mail and authorized depositories for mail matter knowing the same to have been stolen, taken, embezzled and abstracted:

COUNT

ADDRESSEE

- | | |
|---|---|
| 1 | Margie Simmons
309 E. 164th Street
Bronx, New York 10456 |
| 2 | Azalea Bates
984 Findlay Avenue
Bronx, New York 10456 |
| 3 | Linderca Nerys
946 College Avenue
Bronx, New York 10456 |
| 4 | Deborah Wilkins
968 Morris Avenue
Bronx, New York 10456 |
| 5 | Eleanor Graves
1148 Clay Avenue
Bronx, New York 10456 |
| 6 | Queen Esther Mitchell
355 East 165th Street
Bronx, New York 10456 |
| 7 | Ilsan Caldero
1100 Clay Avenue
Bronx, New York 10456 |

MICROFILM

MAR 20 1974

74 CRM 261

APR 1 1974

United States District Court

SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA

vs.

HENRY JENKINS,

Defendant.

INDICTMENT

74 Cr.

(18 U.S.C. § 1708.)

PAUL J. CURRAN

United States Attorney.

A TRUE BILL

Foreman.

DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
MAR 18 1974

MAR 18 1974

S. D. OF N. Y.

Def Henry Jenkins expense

(Atty General there, legal aid prevent) Deft pleads n/g.

10 days for motion Case assigned to Pollock J. Paid

Fixed by Court at \$5000.00 P.R.O. removed.

Tony J. [initials]

JUN 13 1974

Before Magistrate, J. Jay Trial begun.

Def't's motion to dismiss denied 13016 -

GRANTED

JUN 14 1974

Trial continued & concluded -

On def't's motion Court grants a mistrial - New trial is set for Monday 6-17-74. 10:30 AM. Deft sentenced on present trial.

Magistrate J.

JUN 17 1974

Before Magistrate - Jay trial begun

JUN 18 1974

Trial continued. Juror #3, Brianegan is excused. Allegedly Juror #1 is now Juror #3 (James J. Boag)

JUN 19 1974 - Trial continued and concluded

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2 had any comments. Then after the statement is transcribed he
3 reads the entire statement to Mr. Jenkins. Mr. Jenkins says
4 it is correct and Mr. Jenkins signs it.

5 Mr. Thau has suggested to you that there is
6 something improper about this approach. But the Government
7 submits that under the circumstances this is one of the most
8 careful approaches that Mr. Monroe could have employed to
9 take a statement from Mr. Jenkins which accurately reflected
10 his involvement in the crimes charged in this indictment,
11 which is the real issue.

12 This case is, of course, important to the
13 defendant, Mr. Jenkins, but it is also a very important case
14 for the Government. practice of fencing stolen welfare
15 checks is a very serious matter, and the Government requests
16 that when you retire to the jury room you carefully weigh the
17 evidence in this case, and the Government requests that you
18 return a fair and just verdict. Thank you.

19 THE COURT: Members of the jury, we will take a
20 ten-minute recess.

21 (Recess)

22 (The clerk announced that no one was to leave or
23 enter the courtroom during the charge of the court.)

24 THE COURT: The importance of that announcement,
25 ladies and gentlemen of the jury, is so that you will not be

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2 distracted from my instructions on the law, which are not
3 overly long in this particular case, but it is necessary that
4 you pay as full attention to these as you have to every other
5 part of this case.

6 You are now about to enter upon your final duty,
7 which is to decide the fact issues in the case. As I told
8 you in my instructions at the beginning of the trial, your
9 principal function during the taking of testimony would be
10 to listen carefully and observe each witness as he testified.
11 It has been evident to me that you have faithfully discharged
12 this duty. We have now reached the point of the case where
13 all the evidence has been presented and the closing arguments
14 of the lawyers have been made. Shortly after I have completed
15 my explanation of the applicable law, you will retire to
16 deliberate upon your verdict.

17 You are to perform your final duty in an attitude
18 of complete fairness and impartiality. You are to appraise
19 the evidence calmly and deliberately and, as was emphasized
20 by me at the time of your selection as jurors, without bias
21 or prejudice with respect to either the Government or to the
22 defendant as parties to this controversy.

23 The fact that this prosecution is brought in the
24 name of the United States of America entitles the Government
25 to no greater consideration than that accorded to any other

2 party in the case. By the same token, it is entitled to no
3 less consideration. All parties stand as equals before the
4 bar of justice.

5 Your final role is to pass upon and decide the
6 fact issues in the case. You, the members of the jury, are
7 the sole and exclusive judges of the facts. You pass upon
8 the weight of the evidence, you determine the credibility of
9 the witnesses, you resolve such conflicts as there may be in
10 the testimony, and you draw whatever reasonable inferences
11 that are to be drawn from the facts as you determine them
12 to be.

13 My function at this point is to instruct you as to
14 the law. It is your duty to accept these instructions of law
15 and apply them to the facts as you determine the facts to be.
16 The logical result of that application will be your verdict
17 in this case.

18 With respect to any fact matter, it is your
19 recollection and yours alone that governs. Anything that
20 counsel either for the Government or for the defendant may
21 have said with respect to any matter in evidence -- that is,
22 as to any factual matter, whether stated in a question, in
23 argument, or in summation -- is not to be substituted for your
24 own independent recollection. So too anything that the Court
25 may have said during the course of the trial with respect to

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2 a fact matter or may say during the course of these
3 instructions is not be taken in substitution of your own
4 independent recollection, which governs at all times. So
5 too the opinions of counsel are nothing but their own personal
6 opinions and not to be considered by you.

7 Before we consider the precise charges of the
8 indictment, a number of preliminary observations are in order.
9 In determining the facts, you should not be influenced by any
10 rulings that the Court may have made during the trial. These
11 rulings dealt with matters of law and not questions of fact,
12 and counsel for both sides have not only the right but indeed
13 the duty to press whatever legal objections they believe
14 exist as to the admission of offered evidence. The Court's
15 rulings on objections made either by the attorney for the
16 Government or the attorney for the defendant are not to be
17 considered by you.

18 Of course, as I told you at the outset, where I
19 have sustained an objection to a question, you must not
20 speculate on what the witness would have said had he been
21 permitted to answer, nor may you draw any inference from the
22 wording of the question or the mere fact that it was asked.
23 Similarly, where any testimony was stricken, it is not
24 evidence and you are bound to disregard it. However, you must
25 remember that in ruling on objections the Court is deciding

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2 questions of law and not questions of fact, which are for you
3 as members of the jury and for you alone.

4 During the course of the trial there may have been
5 occasions when you thought I was admonishing either one of the
6 attorneys, and sometimes in the ardor of advocacy counsel say
7 or do things which in calmer moments they would not have said
8 or done. Any such incidents must play no part in your
9 deliberations. The personalities of the lawyers or the
10 personality of the judge hasn't anything to do with this case,
11 and I recognize that any judge can have a great deal of
12 influence with a jury, and I want you to understand that I
13 have no opinion with respect to the guilt or innocence of
14 this defendant.

15 If you do think that you have gleaned some
16 indication as to my opinion of the case, either from any
17 questions I may have asked or from my expression or tone of
18 voice, disregard it entirely. The Court has no opinion as
19 to the veracity or the credibility of the witnesses or the
20 merits of the case. You are the judges of the facts and you
21 are the sole judges of the guilt or innocence of this
22 defendant. I am merely a judge of the law. The fact issues
23 must be decided by you solely and only within the framework
24 of the evidence and the principles of law that apply.
25 Finally, please do not single out any one of my instructions

as stating the law alone. Take them all into account after you have heard them all.

You are to consider only the evidence in this case, and that evidence consists of the sworn testimony of the witnesses, the exhibits which have been received in evidence, the facts which have been stipulated, and the presumptions which I will tell you about in these instructions, such as the presumption of innocence. But while you are to consider only the evidence in this case, you are not limited to the bald statements of the witnesses. On the contrary, you are permitted to draw from the facts which you find have been proved such reasonable inferences as seem justified to you in the light of your own experience. An inference is another word for a conclusion which reason or common sense leads you to draw from the facts that have been proved here.

In considering the evidence, you must remember, as I told you at the beginning of this trial, that the indictment is only a formal method of accusing a defendant of the crime charged and in itself is not evidence against the defendant, nor is any weight to be given to the fact that an indictment has been returned against the defendant.

Generally speaking, there are two types of evidence from which a jury may properly find the truth as to

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2 the facts in a case. One is direct evidence, such as the
3 testimony of an eyewitness, somebody who saw or heard some-
4 thing done or said. The other is indirect or circumstantial
5 evidence, that is, the proof of a chain of circumstances
6 pointing to the existence or nonexistence of certain facts.
7 Generally, the law makes no distinction between direct and
8 circumstantial evidence but simply requires that the jury find
9 the facts in accordance with all the evidence in the case,
10 both direct and circumstantial.

11 We have--and perhaps you jurors who have sat on
12 cases this past week heard this before--in this courtroom a
13 fairly common, simple example that is frequently used to
14 illustrate what is meant by circumstantial evidence.

15 Let us assume that when you came into court this
16 morning, as it was and still is, the sun was shining brightly,
17 the sky was clear, and no indication of any rain ahead. In
18 addition, assume that you were in one of the modern air-
19 conditioned courtrooms with no windows and that we were in the
20 first courtroom right inside the entrance to this courthouse.
21 Assume further that we had been in court for about an hour
22 and someone walked into court carrying an umbrella which was
23 dripping water. Assume shortly thereafter a second person
24 came in wearing a raincoat and carrying a hat in his hand,
25 and both the raincoat and the hat were dripping water. Even

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2 though under those circumstances and in that courtroom on the
3 first floor you could not look out and directly observe the
4 weather, and even though it was not raining when you came in
5 the courthouse in the morning, you could reasonably and
6 logically conclude from the combination of facts that I have
7 just described that in fact it was raining outside. That is
8 circumstantial evidence, a chain of circumstances which leads
9 you to conclude that a fact exists or does not exist. And,
10 as I told you, generally the law makes no distinction between
11 direct evidence and circumstantial evidence but only requires
12 that you find the facts in accordance with all the evidence
13 in the case.

14 I have indicated to you certain matters about
15 presumptions. The defendant has entered the plea of not
16 guilty to the charges of the indictment, and thus the burden
17 is on the prosecution to prove guilt beyond a reasonable
18 doubt. This burden never shifts to a defendant, for the law
19 never imposes upon a defendant in a criminal case the burden
20 or duty of calling any witnesses or producing any evidence.
21 As I told you during your selection as jurors, and in my
22 instructions at the commencement of the trial, the law
23 presumes a defendant to be innocent of crime. Thus a
24 defendant, although accused, begins the trial with no evidence
25 against him, and the law permits nothing but legal evidence

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2 presented before you as jurors to be considered in support of
3 any charge against the defendant. The presumption of
4 innocence remains with the defendant throughout the trial and
5 throughout your deliberations until such time, if ever, as the
6 jury is satisfied of guilt beyond a reasonable doubt. Thus
7 the presumption of innocence alone is sufficient to acquit a
8 defendant unless and until, after careful and impartial
9 consideration of all the evidence in the case, you as jurors
10 are unanimously convinced of the defendant's guilt beyond a
11 reasonable doubt.

12 I am not going to review the evidence in this
13 case. It has been an extremely short case, and counsel have
14 adequately summed up in their summations and marshaled the
15 evidence which they think you ought to consider here. I will
16 merely go over with you and repeat who has appeared here.

17 We had the first witness, Mr. Warren Monroe, a
18 postal inspector for two and a half years and employed in the
19 United States Postal Service. Following that, Exhibit 1 was
20 read to you, which is the stipulation entered into between
21 counsel with respect to the fact that if certain witnesses
22 were called they would testify to certain facts about the
23 checks being mailed and the fact that the recipients or the
24 addressees named in there did not in fact receive the
25 envelopes that were mailed. That is testimony as though the

witness had come in here and that just takes the place of their coming in here. Then the last witness was Mr. Gonzalez, also employed by the postal department.

I am going to turn now to the specific charges set forth in the indictment. The charges in the indictment for your consideration are set forth in fourteen separate counts numbered 1 through 12 and 14 and 15. Incidentally, you will have available to you in the jury room the indictment. Counts 13 and 16 are not before you, nor are they to be considered by you. Each of the remaining counts charges a separate crime, and each count must be considered separately by you.

The fact that you may find the defendant guilty or not guilty as to one of the offenses charged should not control your verdict as to any other offense charged. You should draw no inference from the fact that the two counts that I have indicated are not here for your consideration. That was solely a matter of law which has no bearing on your considerations.

Each of the counts of the indictment which you will consider charges that defendant violated Title 18 of the United States Code, Section 1708, and I am going to read to you the pertinent parts of that section:

"Whoever...unlawfully has in his possession, any

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2 letter...or any article or thing contained therein which has
3 been...stolen, taken, embezzled, or abstracted (from the mail)
4 knowing the same to have been stolen, taken, embezzled or
5 abstracted (shall be guilty of a crime)."

6 Now I am going to read to you the parts of the
7 indictment which are the charges in the indictment. It
8 reads as follows:

9 "The grand jury charges:

10 "On or about the 16th day of April, 1973, in the
11 Southern District of New York" -- and for our purposes the
12 Southern District of New York encompasses Manhattan and Bronx
13 Counties -- "Henry Jenkins, the defendant, did unlawfully,
14 wilfully and knowingly have in his possession the contents of
15 certain letters, addressed as hereinafter set forth, which
16 had been stolen, taken, embezzled and abstracted from and out
17 of the mail and authorized depositories for mail matter
18 knowing the same to have been stolen, taken, embezzled and
19 abstracted."

20 The following counts are counts, as I have
21 indicated before, 1 through 12, and 14 and 15, and opposite
22 each count is the addressee as follows:

23 Count 1. Addressee Margie Simmons, 309 East 164th
24 Street, Bronx, New York 10456.

25 Count 2. Azalea Bates, 984 Findlay Avenue, Bronx,

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2 New York 10456.

3 Count 3. Linderca Nerys, 946 College Avenue,
4 Bronx, New York -- I am not going to read the zip again,
5 because it is all the same zip.

6 Count 4. Deborah Wilkins, 968 Morris Avenue,
7 Bronx, New York.

8 Count 5. Eleanor Graves, 1148 Clay Avenue, Bronx,
9 New York 10456.

10 Count 6. Queen Esther Mitchell, 355 East 165th
11 Street, Bronx, New York.

12 Count 7. Ilsan Caldero, 1100 Clay Avenue, Bronx,
13 New York.

14 Count 8. Elsie Rodrigues, 1020 Trinity Avenue,
15 Bronx, New York.

16 Count 9. Asteria Calero, 965 College Avenue,
17 Bronx, New York.

18 Count 10. Luz Montijo, 360 East 166th Street,
19 Bronx, New York.

20 Count 11. Mary Maylow, 312 East 164th Street,
21 Bronx, New York.

22 Count 12. Clara Chaplin, 973 Teller Avenue, Bronx,
23 New York.

24 Count 14. Julia Mendez, 1072 Teller Avenue,
25 Bronx, New York.

Finally, Count 15. Reuben Williamson, 669 East 165th Street, Bronx, New York.

With respect to each count that you consider, before you may find the defendant guilty you must find beyond a reasonable doubt as to each particular count the following four elements:

(1) that the letter containing the check was stolen from the mail;

(2) that on or about the date specified in the indictment the defendant had in his possession the contents of the letter, that is, the check from the Department of Social Services of the City of New York, payable to the addressee of that letter;

(3) that the defendant unlawfully, wilfully and knowingly had possession of that check; and

(4) that at the time the defendant had possession of that check he knew it was stolen.

As to each of these elements, you must find them all beyond a reasonable doubt before you may find the defendant guilty. As to the first element -- stolen from the mail -- let me advise you as follows: A letter properly mailed by the sender and never received by the addressee but found in improper hands can be found by you to have been stolen from the mail in the absence of any other

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2 explanation. You may make common sense inferences from the
3 proven facts.

4 Here the Government and the defendant have
5 stipulated that an appropriate official of the Department of
6 Social Services of the City of New York would testify that
7 letters containing each of the checks pertinent to the counts
8 of the indictment which you will consider were mailed in the
9 ordinary course of business on or about April 16, 1973, and
10 that the payee of each of these checks would testify that she
11 never received the check payable to her and did not authorize
12 anyone to take possession of it. You are to consider that
13 stipulation the equivalent of such testimony in determining
14 whether each letter containing a check was stolen from the
15 mail.

16 Now the second element, possession: You may make
17 such a finding for any count if you conclude that the
18 defendant physically held the check drawn on the account of
19 the Department of Social Services of the City of New York
20 pertinent to that count either singly or together with a group
21 of other checks, or if you conclude that the defendant had
22 such check in a pocket of his clothing either singly or
23 together with a group of other checks on or about that day.

24 The third element, unlawfully, wilfully and
25 knowingly. Unlawfully means contrary to law. Hence, to do

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2 an act unlawfully means to do something which is contrary to
3 law. An act is done knowingly if it is done voluntarily and
4 purposely and not because of mistake, accident, mere
5 negligence or other innocent reason. An act is done wilfully
6 if it is done voluntarily and intentionally and with the
7 specific intent to do something the law forbids, that is to
8 say, with bad purpose either to disobey or disregard the law.

9 The fourth element -- knowledge that the check was
10 stolen at the time he had possession of it: It is not
11 necessary that the Government prove to a certainty that the
12 defendant knew the check was stolen. The element of knowledge
13 may be satisfied by proof that the defendant acted with
14 reckless disregard of whether the check was stolen and with a
15 conscious purpose to avoid learning the truth. It is not
16 necessary that the defendant knew that the check was stolen
17 from the mail but only that it was stolen.

18 As to each of those elements, I have indicated to
19 you that you must find those beyond a reasonable doubt before
20 you may find the defendant guilty on any one or all of the
21 counts.

22 Before sending you to your deliberations there are
23 a few more general comments I must make. At the beginning of
24 my charge I told you that a defendant is presumed innocent
25 and that that presumption remains with the defendant unless

and until the jury is unanimously satisfied of guilt beyond a reasonable doubt. In describing the elements of the various offenses charged in the indictment, I told you that the Government must establish each of those elements by proof beyond a reasonable doubt.

Naturally, the question arises: What is a reasonable doubt? The words almost define themselves: that there is a doubt founded in reason and arising out of the evidence or lack of the evidence. It is a doubt which a reasonable person has after carefully considering all the evidence. A reasonable doubt is not a vague or speculative or imaginary doubt. It is not caprice, whim or speculation. It is not an excuse to avoid the performance of an unpleasant duty. It is not sympathy for a defendant. A reasonable doubt is a doubt which appeals to your reason, your common sense, your experience, and your judgment. It is a doubt which would cause a reasonable man or woman like yourselves to hesitate to act in relation to your own important private affairs.

Mere suspicion will not justify conviction. Suspicion is not a substitute for evidence, nor is it sufficient to convict if you find that the circumstances merely render an accused probably guilty. On the other hand, it is not required that the Government must prove guilt beyond all

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2 possible doubt. But the proof must be of such convincing
3 character that you would be willing to rely and act on it in
4 the important affairs of your own life.

5 In sum, a reasonable doubt exists whenever, after
6 a fair and impartial consideration of all the evidence
7 before you, you can candidly and honestly state that you do
8 not have an abiding conviction that the defendant is guilty of
9 the charge.

10 You as jurors are the sole judges of the
11 credibility of the witnesses. You and you alone must
12 determine what weight their testimony deserves. I indicated
13 to you at the start some guidelines with respect to that. I
14 am going to repeat and expand upon those instructions at this
15 point.

16 Preliminarily you are to understand that you should
17 not be influenced by the mere number of witnesses called.
18 The weight of the evidence is not necessarily determined by
19 the number of witnesses testifying. Rather, you should
20 consider all the facts and circumstances in evidence to
21 determine where the truth lies. In assessing credibility,
22 you should carefully scrutinize the testimony given, the
23 circumstances under which each witness has testified, and
24 every matter in evidence which tends to indicate whether the
25 witness is worthy of belief. The degree of credit to be given

a witness should be determined by his demeanor, his relationship to the controversy and the parties, his bias or impartiality, the reasonableness of his statements, and the attendant circumstances in the case and the extent to which, if at all, each witness is either supported or contradicted by other evidence. How did the witness impress you? Did his version appear straightforward and candid, or did he try to hide some of the facts? Is there a motive to testify falsely?

In passing upon the credibility of a witness, you may take into account inconsistencies or contradictions as to material matters in his own testimony or any conflict with that of another witness, and also any inconsistencies or omissions in prior testimony or any prior statement of material matters as to which he may have testified upon the trial.

Inconsistencies or discrepancies in testimony of a witness or between the testimony of different witnesses may or may not cause a jury to discredit such testimony. Two or more persons witnessing the same incident or transaction may see or hear it differently; and innocent misrecollection, like failure of recollection, is not an uncommon experience. A witness may be inaccurate, contradictory or untruthful in some respects and yet be entirely credible in the essentials of his testimony. In

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2 weighing the effect of a discrepancy, consider whether it
3 pertains to a matter of importance or an unimportant detail,
4 and whether the discrepancy results from innocent error or
5 wilful falsehood.

6 If you find that any witness has testified falsely,
7 you can do one of two things: You can either reject all of
8 that witness' testimony on the ground that it is all tainted by
9 falsehood and that none of it is worthy of belief, or you can
10 accept that part which you believe to be credible and reject
11 only that part which you believe to be tainted by falsehood.

12 Should you find that all or any part of a
13 particular witness' testimony was false, you may not of
14 course infer that the opposite of that testimony is the
15 truth unless there is other evidence to that effect. Any
16 testimony rejected by you as false is no longer in the case
17 insofar as any finding that you may make is concerned.

18 You will recall that I told you that an inference
19 is a conclusion which reason or common sense leads you to
20 draw from the facts which you find have been proved. Thus a
21 finding of fact may not be established merely by a negative
22 inference arising from your disbelief and rejection of any
23 testimony.

24 In passing upon credibility, the ultimate question
25 for you to decide is, Did the witness tell the truth here

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2 before you? It is for you to say whether his testimony at
3 this trial is truthful in whole or in part in the light of
4 his demeanor, his explanations, and all the evidence in the
5 case.

6 The fact that the live witnesses that you had here
7 were Government enforcement officers does not entitle their
8 testimony to any greater weight or consideration by that
9 fact alone. You will evaluate their credibility the same way
10 you do that of any other witness.

11 Some comment has been made about absent witnesses,
12 and there is a special instruction on that. If it is
13 peculiarly within the power of either the prosecution or the
14 defense to produce a witness who would give material
15 testimony on an issue in the case, the failure to call that
16 witness may give rise to an inference that his testimony would
17 have been unfavorable to that party. However, no such
18 conclusion should be drawn by you with regard to a witness
19 who is equally available to both parties or where the
20 witness' testimony would be merely cumulative. Both sides
21 have the right to interview witnesses at any time before or
22 during the trial, and both sides have the right to subpoena
23 or request witnesses to appear in court. You will always
24 bear in mind that the law never imposes upon a defendant in
25 a criminal case the burden or duty of calling any witnesses

2 or producing any evidence. As I told you, a defendant is
3 not required under our laws to prove his innocence. He is
4 presumed to be innocent at all times through the entire trial
5 unless and until the Government proves his guilt beyond a
6 reasonable doubt. For these reasons a defendant need not
7 take the witness stand and testify in his own behalf.
8 Therefore, the fact that Henry Jenkins did not testify at this
9 trial does not create any presumption against him, and I
10 charge you that this fact must not weigh in the slightest
11 against the defendant, nor shall this fact enter into your
12 discussions or deliberations in any manner.

13 We had some comments here with respect to a
14 statement given by the defendant on December 4, 1973.
15 Evidence relating to any statement claimed to have been made
16 by the defendant outside of court and after a crime has been
17 committed should be considered with caution and weighed with
18 care. All such evidence should be disregarded entirely
19 unless the evidence in the case convinces the jury beyond
20 a reasonable doubt that the statement was knowingly made.
21 A statement is knowingly made if done voluntarily and
22 intentionally and not because of mistake or accident or
23 other innocent reason.

24 In determining whether any statement claimed to have
25 been made by the defendant outside of court and after a

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2 crime has been committed was knowingly made, the jury should
3 consider the age, training, education, occupation, and
4 physical and mental condition of the defendant and his
5 treatment while in custody or under interrogation as shown
6 by the evidence in the case, and also all other circumstances
7 and evidence surrounding the making of the statement,
8 including whether before the statement was made the defendant
9 knew or had been told and understood that he was not obligated
10 or required to make the statement claimed to have been made
11 by him; that any statement which he might make could be used
12 against him in court; that he was entitled to the assistance
13 of counsel before making any statement either written or oral;
14 and that if he was without money or means to retain counsel of
15 his own choice an attorney would be appointed to advise and
16 represent him free of cost or obligation. If the evidence in
17 the case does not convince you beyond a reasonable doubt that
18 the statement was voluntarily and intentionally made, you
19 should disregard it entirely. On the other hand, if the
20 evidence in the case does show beyond a reasonable doubt
21 that the statement was in fact voluntarily and intentionally
22 made by the defendant, you may consider it as evidence in
23 the case against this defendant if he voluntarily and
24 intentionally made the statement.

25 In your deliberations please do not discuss the

question of possible punishment. That is a matter that rests on my conscience and my conscience alone, because the judge and the judge alone is the one who has the obligation of imposing sentence when and if guilt is determined. If you do discuss it amongst yourselves, then you are encroaching upon my function and I ask you not to do it. Your function is to consider the facts and to determine the facts, and my function is to pass upon the law and, in the event of conviction, to impose sentence.

If you find on all the evidence that the evidence respecting the defendant leaves a reasonable doubt as to his guilt, you should not hesitate for a moment to return a verdict of not guilty as to the defendant. However, on the other hand, if you find beyond a reasonable doubt that the law has been violated as charged, you should not hesitate because of sympathy or because of any other reason to render a verdict of guilty.

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.

It is your duty as jurors to consult with one another and deliberate with a view to reaching an agreement if you can do so without violence to individual judgment.

Each of you must decide the case for yourself but do so only after an impartial consideration of the evidence with your fellow jurors.

In the course of your deliberations do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

You are not partisans. You are judges, judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

If it becomes necessary during your deliberations to communicate with the Court, you may send a note by the marshal signed by your foreman or by one or more members of the jury. No member of the jury should ever attempt to communicate with the Court by any means other than a signed writing. The Court will never communicate with any member of the jury on any subject touching the merits of the case otherwise than in writing or orally here in open court.

You have the right to have the exhibits or to have any testimony that you may wish read back to you. You will be given a form of verdict which recites the counts on it, says, on Count 1, "We, the jury, find the defendant" -- and

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2 it is left blank as to each count. That is for your
3 convenience in reporting your verdict.

4 You will note by the oath about to be taken by the
5 marshals that they too, as well as all other persons, are
6 forbidden to communicate in any way or manner with any member
7 of the jury on any subject touching the merits of the case.

8 Bear in mind also that you are never to reveal to
9 anyone, not even to the Court, how you stand numerically or
10 otherwise on the question of the guilt or innocence of the
11 defendant unless and until after you reached a unanimous
12 verdict.

13 It is proper for me to add at this point that
14 nothing said in these instructions, nothing in the form of
15 the verdict prepared for your convenience, is to suggest or
16 convey in any way or manner any intimation as to what verdict
17 I think you should find. What the verdict shall be is the
18 sole and exclusive duty and responsibility of the jury.

19 Are there any exceptions or requests, gentlemen?

20 MR. THAU: Yes, your Honor.

21 MR. FRYMAN: No, your Honor.

22 MR. THAU: Yes, may we go in chambers.

23 THE COURT: Will you just wait a moment. We have
24 to see whether or not there are other things that I may have
25 missed, and it will be more convenient if you would wait there

and I will take counsel in the robing room.

(In the robing room)

THE COURT: Has the defendant any exceptions?

MR. THAU: Yes, your Honor.

THE COURT: What do you except to?

MR. THAU: The defendant, your Honor, excepts to that part of the charge where your Honor said in substance that for our purposes the Southern District encompasses Manhattan and Bronx County. That is all your Honor said in the entire charge on the issue. How they should find, whether the crime was committed in this district, I think your Honor should have put to them as well, based on the evidence.

THE COURT: Denied except as charged.

MR. THAU: Exception. Your Honor has given the cumulative-witness charge. Since there was no evidence, as I recall, which justifies the suspicion that anybody else's testimony would have been cumulative, I don't think it should have been given.

THE COURT: It is possible that Jones and the secretary could have been cumulative, if it was given. That is why it was brought up.

MR. THAU: Thank you.

THE COURT: No further requests?

MR. THAU: Further requests in the area of

I, Henry Jenkins having been duly sworn, depose and state:

I have been advised of my Constitutional rights by Inspector W. H. Monroe in the presence of Inspector E. Jones, Jr.. I understand I have a right to remain silent. Further, anything I say can be used against me in court. I have been advised I have the right to talk to a lawyer for advice before I answer any questions and to have him with me during the questioning. I have been informed that if I cannot afford a lawyer, one will be appointed for me before any questioning, if I so desire. I have been further informed that if I decide to answer any questions now without a lawyer present I will still have the right to stop answering at any time. I also understand I have a right to stop answering at any time until I talk to a lawyer. I have read a statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion have been used against me.

My name is Henry Jenkins. I am 45 years old and am the present owner of Henry's Luncheonette located at 381 Lenox Avenue. I give this statement freely without threat or promise. I have been advised of my rights against self-incrimination by Inspector Monroe in the presence of Inspector Jones. I have been shown several City of New York, Department of Social Services checks and have picked out those checks which were given to me by a person who works for the Post Office, and who I know as Big Man. The checks were given to me on or about April 16, 1973. The checks are the following:

Check #	Dated	In the amount of
42428189	4/16/73	\$146.50
42433204	4/16/73	355.00
42438049	4/16/73	133.40
42433381	4/16/73	243.20
42435234	4/16/73	172.60
42637684	4/16/73	160.00
42640270	4/16/73	183.50
42429517	4/16/73	143.00
42425597	4/16/73	154.00
42636237	4/16/73	163.20
42643935	4/16/73	110.50
42433239	4/16/73	243.50
42432527	4/16/73	181.30
42436141	4/16/73	174.00
42636170	4/16/73	243.50
42637952	4/16/73	162.00

After receiving the checks from Big Man, knowing the same to have been stolen, I gave the subject checks to Vincent Cartilliga, who operated a Meat Market located on Lenox Avenue, between 128th and 129th Streets. A couple of hours later, Vincent would give me approximately half of the face value of the checks. I, in turn, gave Big Man the money and Big Man would give me approximately 1/5 of what he received for the checks. I received approximately 30 to 40 checks which were given to me each check day from Big Man.

I am willing to testify to this in court.

Sworn and subscribed to before me this 14th day of December at Bronx, New York, 1973.

W. H. Monroe, Police Inspector

Henry Jenkins

Certificate of Service

Nov. 15, 1974

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

Paul J. Rosenberg